## Sukiran bin Sarman v Petronas Dagangan Bhd

HIGH COURT (KUALA LUMPUR) — WRIT SUMMONS NO D-22NCC-1536 OF 2010
MARY LIM J
29 MAY 2013

*Contract — Specific performance — Claim for outstanding balance — Sale and purchase agreement of land — Land intended for building of petrol station — Whether conversion of property procured from authorities — Whether there was money owing under agreement — Allegation that defendant entitled to dealership to operate petrol station — Whether vendor entitled to specific performance of allegation — Whether vendor entitled to damages for buyer's failure to accord such dealership*

The plaintiff had entered into a sale and purchase agreement ('SPA') with the registered owners of a 5.5 acre land and the land was subsequently demarcated into two parts; one measuring approximately one acre ('part A') while the other measuring half an acre ('part B'). Under the SPA, the plaintiff was responsible for the subdivision and the issuance of separate title for part A. Six months later, the plaintiff and the defendant entered into an SPA for part A in the sum of RM1,481,040 ('the purchase price') which was to be settled on staggered payments pegged to certain milestones. The defendant's purpose of purchase was to build a petrol station and the plaintiff was aware of this. Pursuant to cl 3.2 of the SPA, the plaintiff was required to satisfy them within 12 months from the date of the SPA; or such further period as the defendant might determine. The plaintiff claimed that he had procured the approval of the Department of Town and Country Planning for the conversion of the said property and he informed the defendant of this and sought payment of the balance purchase price. In denying that there was any money owing under the SPA, the defendant claimed that the approvals had not been obtained by the plaintiff. The conversion approval was obtained and from these approvals, the defendant was required to reserve 12,011 square feet for access and/or right of ingress and egress; and for drainage. This reserve which was meant for public use then had to be surrendered to the state authority. At the same time, the defendant took issue with the issuance of title to the said property as it was averred that this was also the plaintiff's responsibility. Not less than four issue documents of title ('IDT') of the said property were issued. The defendant claimed that all the earlier IDTs could not be considered because the conditions precedent had not been fulfilled. The IDTs also did not take into account the road and drainage reserves that came with the approvals. The fourth IDT was then issued bearing this new acreage. Relying on, inter alia, this new IDT and cl 10.3 of the SPA, the defendant claimed that it was entitled to set-off the sum

of RM408,374 which was the deduction for the 12,011 square feet set aside for the reserves earlier mentioned at the rate of RM34 per square foot. The defendant contended that it had settled the purchase price in full. According to the plaintiff, the property was sold at far below the prevailing market price because the defendant collaterally agreed to appoint the nominee of the plaintiff as the operator of the petrol station that would eventually be built on the said property. However, the defendant rejected the nomination of the first nominee and the plaintiff was asked to nominate another name within 14 days. The plaintiff's second nomination was also rejected by the defendant. In response, the defendant claimed that it had only granted the plaintiff priority to nominate a person for the operation of the petrol station on the said property. The plaintiffs claimed for the balance outstanding under the SPA; and the remedy of specific performance and general damages together with loss of profits under the collateral agreement. The issues that arose for the court's determination were: whether there was a balance sum still due and outstanding under the SPA; and whether the plaintiff was entitled to specific performance of an alleged collateral agreement that the plaintiff be entitled to dealership to operate the petrol station on the said land and if so, was the plaintiff entitled to damages for the defendant's failure to accord such dealership to the plaintiff.

**Held**, dismissing the claim with costs:

(1) The testimonies and conduct of the parties, the timelines and the milestones specified were extended without much fuss under cl 3.2 of the SPA. In fact, the various approvals were not obtained in the order or time anticipated. Consequently, even the payments for each installment were not paid in full or in the same anticipated sequence. However, such agreement to extensions of time for fulfilling the conditions precedent did not constitute waiver (see paras 28–29).

(2) Where there was a non-fulfilment of the conditions precedent, the defendant had the option of termination. Clause 3.1 was clear in that it provided for conditions precedent that must be satisfied by the plaintiff. Reading from cll 3.2 and 3.3, it could be readily inferred that the non-fulfilment of these conditions afforded or entitled the defendant a right to terminate. That right might, however, be waived. The terms found in cll 3.3 and 10.3 did not mean that the defendant must necessarily exercise either of the options provided. The defendant chose to carry on with the completion of the SPA. The evidence showed that the defendant was intent on proceeding with the completion of the sale regardless of the breaches or alleged breaches on the part of the plaintiff (see paras 32, 36, 37).

(3) The first IDT was issued for 5.5 acres and it was not in the defendant's name. The second IDT issued had the defendant's name but none of the approvals had been procured. The category of use was still 'agriculture' at

this point in time. It was only where all the conditions precedent have been fulfilled that the SPA was deemed completed. As far back as 2007, the defendant had registered its position as far as the approvals were concerned. Even at the time of the issue of the third IDT, not all approvals had been granted. Since the obligation of procuring the requisite approvals was the plaintiff's and since the parties had clearly intended that the delivery of vacant possession of the said property was sans the reserves as ordinarily required by the relevant authorities, the parties had clearly intended the size of the said property to be material to the SPA. Hence, the specific mention of the 'net usable area' as a condition precedent in the SPA and the provision in cl 10.3 for the necessary and appropriate set-off (see paras 39–40).

(4) There was no evidence to suggest that the defendant had promised to appoint the plaintiff's nominee to operate the petrol station. The understanding at all times was that of priority and even then, on conditions. The plaintiff claimed that its allegations of bad faith in refusing to accept the second nomination was said to be supported by, inter alia, the fact that the defendant owed the plaintiff the balance of the purchase price. There was no merit in this contention (see paras 49 & 53).

(5) Opportunity had been afforded and there was no breach. The court did not find the conditions for the grant of an order of specific performance. The plaintiff relied on the evidence of the valuer and claimed that the land was sold at below the prevailing market value. This suggestion was untenable. In relation to the value of the said property, it was transacted on a willing buyer willing seller basis and that would form the true commercial value of the said property (see paras 55–56).

**[Bahasa Malaysia summary**

Plaintif telah memeterai perjanjian jual beli ('PJB') dengan pemilik berdaftar 5.5 ekar tanah dan tanah tersebut kemudiannya digariskan menjadi dua bahagian, satu seluas kira-kira satu ekar ('bahagian A') manakala yang satu lagi berukuran setengah ekar ('bahagian B'). Di bawah PJB, plaintif bertanggungjawab bagi pemecahan dan pengeluaran hak milik berasingan untuk bahagian A. Enam bulan kemudian, plaintif dan defendan telah memeterai PJB bagi bahagian A berjumlah RM1,481,040 ('harga belian') yang perlu diselesaikan melalui bayaran berperingkat bersandarkan kepada peristiwa-peristiwa tertentu. Tujuan pembelian oleh defendan adalah untuk membina sebuah stesen minyak dan plaintif mengetahui akan ini. Menurut klausa 3.2 PJB, plaintif dikehendaki memenuhi ini dalam tempoh 12 bulan dari tarikh PJB tersebut, atau tempoh selanjutnya sebagaimana yang diputuskan oleh defendan. Plaintif mendakwa bahawa dia telah memperoleh kelulusan Jabatan Perancangan Bandar dan Desa bagi penukaran harta tersebut dan telah memaklumkan defendan akan ini dan meminta baki bayaran harga

belian. Dalam menafikan bahawa terdapat wang yang tertunggak di bawah PJB, defendan mendakwa bahawa kelulusan tidak diperolehi oleh plaintif. Kelulusan penukaran telah diperolehi dan daripada kelulusan ini, defendan perlu merizabkan 12,011 kaki persegi bagi akses dan/atau hak kemasukan dan keluar; dan untuk perparitan. Rizab ini yang merupakan bagi kegunaan awam kemudiannya terpaksa diserahkan kepada pihak berkuasa negeri. Pada masa yang sama, defendan mengutarakan isu tentang pengeluaran hak milik harta tersebut kerana ditegaskan bahawa ini juga menjadi tanggungjawab plaintif. Tidak kurang daripada empat isu dokumen hak milik ('IDT') harta tersebut telah dikeluarkan. Defendan mendakwa bahawa kesemua IDT sebelum ini tidak boleh dipertimbangkan kerana syarat terdahulu telah tidak dipenuhi. IDT tersebut juga tidak mengambil kira rizab jalan dan perparitan yang mempunyai kelulusan. IDT keempat kemudiannya dikeluarkan dengan keluasan baru ini. Bersandarkan kepada, antara lain, IDT yang baru ini dan klausa 10.3 PJB, defendan menghujahkan bahawa ia berhak untuk menolak jumlah RM408,374 yang merupakan potongan 12,011 kaki persegi diketepikan untuk rizab yang disebut sebelum ini iaitu pada kadar RM34 setiap kaki persegi. Defendan menghujahkan bahawa ia telah menyelesaikan harga belian sepenuhnya. Menurut plaintif, harta tersebut dijual jauh di bawah harga pasaran kerana defendan secara kolateral bersetuju untuk melantik penama plaintif sebagai pengendali stesen minyak yang akan dibina atas harta tersebut. Walau bagaimanapun, defendan menolak pencalonan penama pertama dan plaintif telah diminta untuk mencalonkan nama lain dalam tempoh 14 hari. Pencalonan kedua plaintif juga telah ditolak oleh defendan. Sebagai balasan, defendan mendakwa bahawa ia hanya memberikan keutamaan kepada plaintif untuk menamakan seseorang untuk operasi stesen minyak ke atas harta tersebut. Plaintif menuntut baki tertunggak di bawah PJB dan remedy pelaksanaan spesifik dan ganti rugi am bersama-sama dengan kehilangan keuntungan di bawah perjanjian kolateral. Isu-isu yang timbul untuk pemutusan mahkamah adalah: sama ada terdapat jumlah baki yang masih belum dijelaskan di bawah PJB, dan sama ada plaintif berhak kepada pelaksanaan spesifik ke atas perjanjian kolateral yang didakwa bahawa plaintif berhak bagi pengedaran untuk mengendalikan stesen minyak di atas tanah tersebut dan jika ya, adakah plaintif berhak kepada ganti rugi bagi kerugian defendan untuk memberikan pengedaran tersebut kepada plaintif.

**Diputuskan**, menolak tuntutan dengan kos:

(1) Testimoni-testimoni dan kelakuan pihak-pihak, garis-garis masa dan pencapaian yang dinyatakan telah dilanjutkan tanpa masalah di bawah klausa 3.2 PJB. Malahan, pelbagai kelulusan tidak diperolehi dalam perintah tersebut atau masa yang dijangkakan. Oleh itu, bayaran untuk setiap ansuran juga tidak dibayar sepenuhnya atau dalam turutan yang

dijangkakan. Walau bagaimanapun, apa-apa perjanjian untuk lanjutan masa untuk memenuhi syarat terdahulu bukan merupakan pengecualian (lihat perenggan 28–29). A

(2) Di mana syarat-syarat tidak dipenuhi, defendan mempunyai pilihan penamatan. Klausa 3.1 adalah jelas kerana ia disediakan untuk syarat-syarat terdahulu yang perlu dipenuhi oleh plaintif. Bacaan klausa 3.2 dan 3.3, dengan mudah boleh disimpulkan bahawa ketidakpenuhan syarat-syarat ini memberikan atau menjadikan defendan berhak ke atas penamatan. Hak tersebut mungkin, walau bagaimanapun, diketepikan. Syarat-syarat yang terdapat dalam klausa 3.3 dan 10.3 tidak bermakna bahawa defendan mesti membuat salah satu daripada pilihan yang diberikan. Defendan memilih untuk meneruskan dengan penyempurnaan PJB. Keterangan-keterangan menunjukkan bahawa defendan berniat meneruskan penyempurnaan jualan tanpa mengira pelanggaran atau dakwaan pelanggaran di pihak plaintif (lihat perenggan 32, 36–37). B C D

(3) IDT pertama telah dikeluarkan untuk 5.5 ekar dan ia bukan atas nama defendan. IDT kedua yang dikeluarkan mempunyai nama defendan tetapi tiada kelulusan yang telah diperolehi. Kategori penggunaan masih 'agrikultur' pada masa ini. Ia hanya di mana semua syarat terdahulu telah dipenuhi barulah PJB tersebut dianggap selesai. Seawal 2007, defendan telah mendaftarkan kedudukannya setakat mana kelulusan adalah relevan. Malahan, semasa pengeluaran IDT ketiga, tidak semua kelulusan telah diberikan. Oleh kerana kewajipan mendapatkan kelulusan yang diperlukan adalah di atas plaintif dan memandangkan pihak-pihak jelas meniatkan agar penyerahan milikan kosong harta tersebut adalah tanpa rizab sebagaimana yang biasanya dikehendaki oleh pihak berkuasa berkenaan, pihak-pihak jelas memaksudkan saiz harta tersebut material kepada PJB. Oleh itu, pernyataan khusus 'net usable area' sebagai satu syarat terdahulu dalam PJB dan peruntukan dalam klausa 10.3 untuk keperluan dan kesesuaian penolakan (lihat perenggan 39–40). E F G

(4) Tiada keterangan yang menunjukkan bahawa defendan telah berjanji untuk melantik calon plaintif untuk mengendalikan stesen petrol. Persefahaman pada setiap masa adalah mengenai keutamaan dan walaupun pada masa itu, pada keadaan. Plaintif mendakwa bahawa dakwaan niat jahat dalam keengganan menerima pencalonan kedua dikatakan disokong oleh, antara lain, fakta bahawa defendan berhutang dengan plaintif bagi baki harga belian. Tiada merit dalam hujahan ini (lihat perenggan 49 & 53). H I

(5) Peluang telah diberikan dan tidak terdapat pelanggaran. Mahkamah tidak mendapati syarat-syarat pemberian bagi suatu perintah pelaksanaan spesifik. Plaintif bergantung kepada keterangan penilai dan

mendakwa bahawa tanah tersebut dijual di bawah nilai pasaran semasa. Hujahan ini tidak dapat dipertahankan. Berhubung dengan nilai harta tersebut, ia dijalankan berdasarkan persetujuan pembeli sanggup penjual sanggup dan ia akan membentuk nilai komersial sebenar harta tersebut (lihat perenggan 55–56).]

**Cases referred to**

*Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754, SC (refd)

*Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597, FC (refd)

*Collector of Land Revenue v Alagappa Chettiar Collector of Land Revenue v Ong Thye Eng and cross appeals* [1971] 1 MLJ 43, PC (refd)

*Malayan Banking Bhd v Lim Poh Ho & Anor* [1997] 1 MLJ 662, CA (refd)

*Pentadbir Tanah Daerah Kota Tinggi v Siti Zakiyah bte Sh Abu Bakar & Ors* [2006] 2 MLJ 426, FC (refd)

*Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd* [1999] 3 MLJ 489, CA (refd)

*Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, FC (refd)

**Legislation referred to**

Town and Country Planning Act of 1976

*James Culaz (Culaz & Associates) for the plaintiff.*
*Robert Low (Helen Lim with him) (Ranjit Ooi & Robert Low) for the defendant.*

**Mary Lim J:**

FACTUAL BACKGROUND

**[1]** At a meeting on 12 December 2001 held at the defendant's office, the plaintiff together with one Hj Ismail Kamari ('PW3') met with the representatives of the defendant to discuss the plaintiff's offer to sell land that he had yet to own. The plaintiff's offer was set out in his letter dated 21 June 2001. The meeting was successful from both parties' perspective. The sale was agreed in principle and that is borne out by the defendant's letter dated 23 January 2002 to that effect (see p 78 of bundle B).

**[2]** The plaintiff then set things in motion. He entered into a sale and purchase agreement with two brothers, Mohd Maskuri bin Hj Mardzuki and Mohamad Mashud bin Hj Mardzuki, the registered owners of 5.5 acres of land under GM 627, Lot 5, Mukim Hujung Permatang, Daerah Kuala Selangor. These two gentlemen sold 65,340 square feet (1 1/2 acres) of their land to the plaintiff vide written agreement dated 29 March 2002. In this agreement, the land purchased by the plaintiff was demarcated into two parts; that marked

Part A measuring approximately one acre, the other marked Part B measuring half acre. Under this agreement, the plaintiff was responsible for the subdivision and the issuance of separate title for Part A which he intended to sell to the defendant. The plaintiff was given a power of attorney by the two brothers to attend to these matters and to sell his beneficial interest.

**[3]** Six months after their meeting, a written sale and purchase agreement dated 6 June 2002 was drawn up between the plaintiff and the defendant evidencing the sale of one acre of that 1 1/2 acres of land, that is, Part A, to the defendant for RM1,481,040 subject to the terms and conditions as found in the agreement ('SPA'). This purchase price was to be settled on staggered payments pegged to certain milestones.

**[4]** At all times, the plaintiff was aware of the defendant's purpose in the purchase. He knew that the defendant wanted to build a petrol station on this 1 acre plot of land (the said property). In fact, as mentioned at the outset, he was the party who made the first approach. That is not in dispute.

**[5]** The SPA contained certain conditions precedent related to the purpose of the defendant's purchase. The conditions precedent, inter alia, concerned the securing of three approvals from the relevant authorities, or what was referred to as the 'conversion approval', 'direct access approval' and the 'planning approval'. The conversion approval was for use of the said property as a petrol station while the direct access approval referred to the approval for the direct access to the said property to and from the main road fronting the said property. The planning approval was the approval for the development of the petrol station and convenience store and related services to be erected on the said property.

**[6]** Pursuant to cl 3.2 of the SPA, these conditions precedent were borne by the plaintiff who was required to satisfy them within 12 months from the date of the SPA; or such further period as the defendant may determine. This time frame was subsequently extended to 31 December 2004 and 31 March 2006 vide letters dated 3 August 2004 and 3 October 2005. Again, this is not in dispute.

**[7]** The plaintiff claimed to have obtained these approvals. At para 7.1 of the statement of claim, he claimed that he had procured the approval of the Department of Town and Country Planning for the conversion of the said property on 27 April 2004. On 6 January 2005, he informed the defendant of this and asked for payment of the balance purchase price.

**[8]** The defendant denied that there was any money owing under the SPA. It claimed that the three approvals were not duly obtained by the plaintiff.

A Instead, it had to see to such approvals itself. The conversion approval was obtained on 14 July 2005; the direct access approval was obtained on 31 May 2006; while the planning approval was obtained on 27 July 2007. From these approvals, the defendant was required to reserve 12,011sqft for access and/or right of ingress and egress; and for drainage. This reserve which was meant for
B public use then had to be surrendered to the state authority.

**[9]** At the same time, the defendant took issue with the issuance of title to the said property. According to the defendant, this was also the plaintiff's responsibility. Not less than four issue documents of title ('IDT') of the said
C property were issued. The first IDT was issued on 29 July 2002, the second on 6 April 2004, the third on 27 February 2006, before the fourth IDT was issued on 9 June 2011.

D **[10]** The defendant claimed that all the earlier IDTs cannot be considered because the conditions precedent had not been fulfilled. The IDTs also did not take into account the road and drainage reserves that came with the approvals. That being so, as explained by Maizan bt Adam @ Othman ('DW3'), the defendant had to re-submit a new pre-computation plan resulting in the
E remaining net usable land area of the said property as only 31,549sqft. The fourth IDT was then issued bearing this new acreage.

**[11]** The plaintiff was paid on various dates, that is, 12 June 2002; 5 September 2005; 17 December 2007; and 18 February 2011 leaving some
F balance outstanding. Relying on, inter alia, this new IDT and cl 10.3 of the SPA, the defendant claimed that it was entitled to set-off the sum of RM408,374. This sum represented the deduction for the 12,011sqft set aside for the reserves earlier mentioned at the rate of RM34 per sqft. It is therefore the defendant's case that it has settled the purchase price in full.

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**[12]** There is a second part to the plaintiff's claim. According to him, he had sold the said property at far below the prevailing market price because he claimed that by letter dated 23 January 2002, the defendant collaterally agreed to appoint the nominee of the plaintiff as the operator of the petrol station that
H would eventually be built on the said property. Relying on such agreement, the plaintiff proceeded to nominate one Rahimi bin Rahim on 24 November 2007. However, by letter dated 5 May 2008, the defendant rejected the nomination on the ground that the nominee was less than 25 years old and the plaintiff was asked to nominate another name within 14 days.

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**[13]** On 16 May 2008, the plaintiff nominated his wife, Rafizah bt Rahim. He claimed that the defendant's officer by the name of Ir Sakim bin Rosdi requested him to hand in his completed tender documents at the defendant's premises. However, Ir Sakim was not in his office the day the plaintiff attended

to submit his nomination papers. On contacting Ir Sakim through his handphone, he was asked by Ir Sakim to leave his application papers with the clerk at the counter. He did so accordingly.

**[14]** The plaintiff's nomination was rejected by the defendant vide letter dated 26 May 2007. It was rejected on the grounds that the application was submitted late, after the close of nominations on 19 May 2008; and that the plaintiff's proof of means was not exhibited.

**[15]** In response, the defendant claimed that it had only granted the plaintiff priority to nominate a person for the operation of the petrol station on the said property. That right was however subject to terms set out by the defendant as well as the relevant government ministries.

The defendant claimed that the nomination submitted by the plaintiff was late. Further, the form was not submitted together with the requisite supporting documents despite various time extensions given.

**[16]** The plaintiff's claim is for the balance outstanding under the SPA; and the remedy of specific performance and general damages together with loss of profits under the collateral agreement.

ISSUES FOR TRIAL

**[17]** Initially, the parties agreed on nine issues to be determined. However, in the course of submissions, those issues were condensed into the following:

(a) whether there is a balance sum still due and outstanding under the sale and purchase agreement; and

(b) whether the plaintiff is entitled to specific performance of an alleged collateral agreement that the plaintiff be entitled to dealership to operate the petrol station on the said land. If so, is the plaintiff entitled to damages for the defendant's failure to accord such dealership to the plaintiff.

**[18]** The first issue requires an examination of especially cll 3 and 10 of the SPA whereas the second issue revolves around the construction of the defendant's letter dated 23 January 2002, in particular para 4.1.

FIRST ISSUE WHETHER THERE IS A BALANCE SUM STILL DUE AND OUTSTANDING UNDER THE SALE AND PURCHASE AGREEMENT

**[19]** I shall first deal with the testimonies of the witnesses called by each

party. Apart from himself, the plaintiff called three other witnesses. He called Mohd Maskuri bin Hj Mardzuki ('PW2') from whom he bought the said property. PW2 confirmed the existence of the sale from him and his brother. He also confirmed that he had been fully paid by the plaintiff.

**[20]** The next witness, Hj Ismail bin Kamari ('PW3') accompanied the plaintiff to the negotiations leading to the SPA. He confirmed the discussions between the parties on the ingress and egress from the said property. He also confirmed that the defendant had agreed to give the plaintiff 'keutamaan' or priority in the appointment of a dealer for the running of the petrol station that would be built on the said property. He informed the court that he was of the opinion that the plaintiff had fulfilled this condition. He did not explain how or why.

**[21]** The plaintiff's final witness was one Ery Zuwardi bin Anuar ('PW4'). He valued the said property. His evidence was confined to that matter. I shall deal with his evidence together with the evidence of Hakimi Yaakob ('DW1') who also prepared a valuation report of the said property later in the matter of damages. DW1's testimony focused on PW4's evidence on the valuation of the said property.

**[22]** Other than DW1, the defendant had two other witnesses. There was Ir Sakim Rosdi ('DW2'). He was the senior manager of Retail Network Planning & Real Estate at the material time. He retired from the defendant's employment in 2008. He was the person familiar with the matter of nominations of dealers to run the petrol station that would be eventually built on the said property. His evidence is really in relation to the nomination of the dealer to operate the petrol station on the said property. I shall deal with his evidence later.

**[23]** The third witness was Maizan bt Adam @ Othman (DW3), the defendant's manager of Retail Network Planning & Real Estate Department. Her job involved ensuring that all lands for existing Petronas petrol stations are free from any issues and that there were no interruptions to the operations of the petrol stations. From her testimony is gathered that the approvals that the plaintiff was to procure were all only procured as late as 2007.

**[24]** Her testimony in relation to the IDTs is particularly relevant. There were a total of four IDTs issued in relation to the said property. This was her explanation. She informed the court that she was informed by the officer at the Land Office, Kuala Selangor that the third IDT was 'irregular' as it did not take into account the required road and drainage reserve, and that the process leading to the issuance of the third IDT was not in order and was incomplete. She explained that the third IDT issued on 27 February 2006 was also not the

relevant IDT because the planning approval of Majlis Daerah Kuala Selangor required the submission of 16 copies of 'Pre-Comp Plan'. The plan serves to divide the boundaries of the subject lot. That plan also contains the reserve areas required by the authorities.

**[25]** This then led to the resubmission of a new pre-computation plan resulting in the remaining net usable land area of the said property as only 31,549sqft. The new or fourth IDT issued by the land office on 9 June 2011 was of a smaller acreage than that agreed under the SPA.

**[26]** As indicated earlier, the pertinent terms of the SPA are cll 3–4 and 10. Clause 4 of the SPA provides for how the purchase price for the said property is to be paid by the defendant:

> (a) a sum of Ringgit Malaysia One Hundred Forty Eight Thousand One Hundred Four (RM148,104.00) only which is equivalent to ten per cent (10%) of the Purchase Price being the Deposit to be paid to the Vendor within twenty one (21) days after execution of this Agreement by the parties hereto.
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> (b) a sum of Ringgit Malaysia Two Hundred Ninety Six Thousand Two Hundred Eight (RM296,208.00) only which is equivalent to twenty per cent (20%) of the Purchase Price to be paid to the Vendor within twenty one (21) days from the occurrence of the following events, whichever is the later:-
>
> (i) the receipt by the Purchaser of written notification from the Vendor or the Vendor's solicitors together with evidence that the Direct Access Approval has been obtained.
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> (ii) the issuance of the Issue Document of Title.
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> (c) a sum of Ringgit Malaysia Two Hundred Ninety Six Thousand Two Hundred Eight (RM296.208.00) only which is equivalent to twenty per cent (20%) of the Purchase Price to be paid to the Vendor within twenty one (21) days from the occurrence of the following events, whichever is the later:
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> (i) the completion of the earthworks as per the plan approved by the relevant authority and the said property having been flattened and levelled to the level of the road fronting the Said Premises, which works shall include the area between the front boundary of the said property and the boundary of the road fronting the said property.
>
> (ii) the receipt by the Purchaser of written notification from the Vendor or the Vendor's solicitors together with evidence that the Conversion Approval has been obtained and the premium and related costs thereon have been fully paid and settled by the Vendor.

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(iii) the receipt by the Purchaser of the written notification from the Vendor or the Vendor's solicitors with evidence that the Planning Approval has been obtained.

(d) the sum of Ringgit Malaysia Six Hundred Sixty Six Thousand Four Hundred Sixty Eight (RM666,468.00) only which is equivalent for forty five per cent (45%) of the Purchase Price to be paid to the Vendor within twenty one (21) days from the occurrence of the following events, whichever is the later:

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(i) the delivery of vacant possession of the said property to the Purchaser in accordance with Clause 6 hereof.

C

(ii) the registration of the Transfer of the said property free from any encumbrances in the name of the Purchaser.

(e) a sum of Ringgit Malaysia Seventy Four Thousand Fifth Two (RM74,052.00) only which is equivalent to five percent (5%) of the Purchase Price being the Deposit to be paid to the Vendor within twenty one (21) days after the date of receipt by the Purchaser of notification together with evidence that the building plan has been approved by Majlis Daerah Kuala Selangor or any other relevant authorities.

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**[27]** As can be seen, the payments are pegged to the approvals required for building a petrol station on the said property. These approvals are the conditions precedent specified in cl 3 of the SPA:

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3.1 This Agreement is conditional upon:

(a) The said property containing a net usable land area of 43,560 square feet or thereabout (hereinafter referred to as 'the Agreed Land Area').

(b) The conversion of the said property for use a petrol service station and convenience store and related services, (hereinafter referred to as 'the Conversion Approval').

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(c) The approval of the relevant authorities for the transfer of the said property from the Vendor to the Purchaser (hereinafter referred to as 'the Consent to Transfer').

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(d) The approval from the relevant authority for the direct access for the said property to and from the main road fronting the said property (hereinafter referred to as 'the Direct Access Approval').

(e) The availability of infrastructure to enable the connection of drainage, piping telecommunication, water and electricity supply to the said property.

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(f) The planning approval for the development of the petrol service station and convenience store and related services to be erected on the said property (hereinafter referred to as 'the Planning Approval').

3.2 The conditions precedent stated in Clause 3.1(a), (b), (c), (d), (e) and (f)

above shall be satisfied by the Vendor within twelve (12) months from the date of this Agreement. Should there be any delay in satisfying the said conditions precedent the Purchaser shall grant to the Vendor a further period of three (3) months or such shorter or longer period as the Purchaser may determine in which to satisfy the said conditions precedent and the right to grant the Vendor that extension of time shall not be unreasonably withheld by the Purchaser, provided that prior thereto the Vendor has duly submitted all necessary documents and complied with all requirements of the relevant authorities in connection with such conditions precedent.

**[28]** It is observed from the documents made available to court, the oral testimonies as well as the conduct of the parties, the timelines and the milestones specified at cll 3–4 were extended without much fuss under cl 3.2 of the SPA. In fact, the various approvals were not obtained in the order or time anticipated. Consequently, even the payments for each instalment were not paid in full or in the same anticipated sequence. This can be seen at p 59 of bundle B, the defendant's letter to the plaintiff dated 5 September 2005 and captioned:

SALE AND PURCHASE AGREEMENT FOR THE PETROL STATION LAND AT LOT 5 GM 627, MUKIM HUJUNG PERMATANG, TANJUNG KARANG, DAERAH KUALA SELANGOR, SELANGOR DARUL EHSAN

Part of Second Payment Amounting to RM148,104.00

Part of Third Payment Amounting to RM 148,104.00

Part of Fourth Payment Amounting to RM296,208.00

**[29]** However, such agreement to extensions of time for fulfilling the conditions precedent do not constitute waiver. That is quite apparent from the defendant's letters when extensions of time came up for consideration — see for example the defendant's letter dated 3 August 2004 and 3 October 2005 found respectively at pp 107–108 of bundle B. In each of these letters, the defendant issued the same reminder to the plaintiff; that he needed to fulfil the terms and obligations under the SPA; and that he should keep the defendant informed as to the progress of the latest developments:

Sukacita kami dengan ini melanjutkan tempoh Perjanjian Jual Beli di atas sehingga 31 Disember 2004. Oleh itu, tuan adalah diingatkan supaya memenuhi terma-terma serta tanggungjawab seperti yang terkandung di dalam Perjanjian Jual Beli tersebut.

Sementara itu, tuan dikehendaki memaklumkan kepada kami perkembangan terbaru berkenaan dengan tanah ini dari masa ke semasa untuk tindakan selanjutnya.

**[30]** The plaintiff's obligations in relation to the conditions precedent therefore remained intact to be fulfilled by him. In fact, this was his evidence. He agreed that he was responsible for obtaining the necessary approvals at his own expense. He testified that he had fulfilled all the conditions as of 29 February 2002 when he transferred the said property to the defendant — see QA 5 of his witness statement. Yet, at QA 7, he informed the court that he had obtained the approval of the Department of Town and Country Planning to convert the category of land use and to amend the express conditions on 27 October 2004. He said that he had informed the defendant of the approval through his letter dated 6 January 2005. Despite not having paid the full price, he testified that the defendant proceeded to build the petrol station and had been operating it since 2007.

**[31]** The plaintiff also testified that the defendant had informed him its reasons for not paying what he called the balance sum; that it was based on cl 10.3 of the SPA. In his disagreement with the defendant, he viewed that his obligations were fulfilled the moment there was ingress and egress. He said so because of his interpretation of cl 3.1 of the SPA.

**[32]** In my view, where there is a non-fulfilment of the conditions precedent, the defendant has the option of termination. This is provided in cl 3.3:

> 3.3 In the event that the Vendor fails to satisfy the said conditions precedent within the initial twelve (12) months as provided under Clause 3.2 above (where no further period is granted by the Purchaser) or within such further period granted by the Purchaser as provided in Clause 3.2, the Purchaser shall be entitled to terminate this Agreement by giving a written notice to the Vendor and the Vendor shall within fourteen (14) days from the date of expiration of such notice, refund all monies paid by the Purchaser to the Vendor, free of any interest provided always that in the event of the Vendor refusing or failing to refund the monies within the aforesaid period, the Vendor shall pay to the Purchaser interest at the rate of ten percent (10%) per annum calculated on a daily basis on all sum remaining unpaid commencing from the expiry of the fourteen (14) days aforesaid until full and final payment.

**[33]** The plaintiff went further to argue that because the defendant did not exercise their right to terminate under cl 10.3, estoppel operates against the defendant who in any case has not lost out since the petrol station is up and running. The plaintiff claimed that under cl 10.3, where the difference was 10% or more the defendant had the option of terminating the SPA within 30 days from the issuance of the IDT. Since it did not do so, then the defendant must be taken to have accepted the said property without any condition.

**[34]** The plaintiff also claimed that the defendant had without the knowledge or consent of the plaintiff proceeded to surrender the 12,011sqft of land for the road and drainage reserves. The plaintiff contended that the

plaintiff was not entitled to do so since it had not paid for that portion of the land, and therefore was not its legal owner. But, since the defendant had surrendered the land, the defendant must have done so as the absolute owner of the 12,011sqft. Having represented themselves as such, the defendant was now estopped from imposing 'the burden of the loss of such land on the plaintiff who as the beneficial owner was not consulted nor his approval sought'.

**[35]** The surrender of the 12,011sqft is further said to have no effect on the meaning of net usable area as the defendant was still able to use it for its business activities as can be seen from the plan and the photographs.

**[36]** With respect, I disagree. Clause 3.1 is clear in that it provides for conditions precedent that must be satisfied by the plaintiff. Reading from cll 3.2–3.3, it can be readily inferred that the non-fulfilment of these conditions affords or entitles the defendant a right to terminate. That right may however, be waived. Similarly, cl 10.3. These are the provisions of cll 10.2–10.3:

> 10.2 The said Property is sold by the Vendor hereunder subject to any road, back lane, improvement and other schemes or plan of any Government or other authority whatsoever affecting the said property PROVIDED that the Vendor hereby declares and covenants with the Purchaser that when delivery of vacant possession shall have been made as aforesaid the said property shall be delivered to the Purchaser entirely exclusive of any portion that may be designated as reserved or any right of way or other road reserve that is ordinarily required by the relevant authorities.
>
> 10.3 It is hereby expressly agreed that if it is determined upon survey and issuance of the Issue Document of Title that the measurement ('the Measurement') in relation to the actual position boundaries and area of the said property shall have been different from that agreed herein, then the Purchase Price shall be adjusted accordingly at the rate of Ringgit Malaysia Thirty Four (RM34.00) only ('said Rate') per square foot. If the measurement turned out to be less than that stipulated in this Agreement the Purchaser is entitled to set-off against the Balance Sum at the said Rate. If the Measurement turned out to be more than that stipulated in this Agreement the Purchaser herby undertake to pay to the Vendor or through the Vendor's solicitors, the additional amount payable within fourteen (14) days from the date of delivery to the Purchaser of the Issue Document of Title.
>
> In the event that the difference in area of the said property upon issuance of the Issue Document of Title amounts to ten percentum (10%) or more of the Agreed Land Area, the Purchaser shall be entitled at its option to terminate this Agreement by a fourteen (14) days written notice to the Vendor and seek for a full refund of the Purchase Price. The Purchaser shall exercise the option to terminate as aforesaid within thirty (30) days from the receipt of the Issue Document of Title from the Vendor, Vendor's

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> Solicitors or from the Registrar of Titles or Land Administrator failing which the Purchaser shall be deemed to have waived the option to terminate and proceed to complete the purchase of the said property in accordance with the terms hereof.

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**[37]** In my judgment, the terms found in cll 3.3 and 10.3 do not mean that the defendant must necessarily exercise either of the options provided. Here, the defendant chose to carry on with the completion of the SPA. At the end of the day, the evidence shows that the defendant was intent on proceeding with the completion of the sale regardless of the breaches or alleged breaches on the

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part of the plaintiff. This is for obvious reasons. The defendant wanted to build and operate a petrol station; and it has done so.

**[38]** Further, a reading of these clauses together clearly indicates that the

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parties intended that the price for the sale would be adjusted depending on the IDT finally issued after all the approvals had been secured — 'when the dust had settled'. I will now explain why the relevant IDT cannot be the first IDT that was sighted.

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**[39]** The first IDT was issued for 5.5 acres and it was not in the defendant's name. The second, issued in 2004 had the defendant's name but none of the approvals had been procured. The category of use was still 'agriculture' at this point in time. I agree with the defendant that it is only where all the conditions precedent have been fulfilled that the SPA is deemed completed. As far back as

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2007, the defendant had registered its position as far as the approvals were concerned.

**[40]** Even at the time of the issue of the third IDT, not all approvals had been granted. Since the obligation of procuring the requisite approvals was the

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plaintiff's and since the parties had clearly intended that the delivery of vacant possession of the said property was sans the reserves as ordinarily required by the relevant authorities, the parties had clearly intended the size of the said property to be material to the SPA. Hence, the specific mention of the 'net usable area' as a condition precedent in the SPA and the provision in cl 10.3 for

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the necessary and appropriate set-off.

**[41]** The plaintiff was fully aware of his responsibilities seeing that he had not requested for payment. Although the second IDT issued on 6 April 2004 bears the defendant's name, it cannot be the pertinent IDT as it does not

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contain the necessary approvals. The category of use was still 'agriculture'. The plaintiff was asked to apply for the conversion by the defendant's letter dated 15 July 2005.

**[42]** The terms of cl 10.3 provide for the adjustment of price according to

the actual size once IDT had been issued. It is my view that this must be the final IDT when all approvals have been obtained and the final as well as the total price comes under review. If the plaintiff's arguments are to be accepted, then it would mean an adjustment as at 2004 when at that time, such adjustments could not have been possible.

**[43]** If the plaintiff had fulfilled his obligations and in the order that was provided, then the plaintiff would have had to procure the necessary approvals which would have included reserves for the ordinary or usual purposes. This was already envisaged in cl 10.2. Once all approvals were obtained, the title would be transferred to the defendant's name. And, that is where cl 10.3 would operate.

**[44]** From the evidence led by both parties, it is quite apparent too that the parties before me are not 'babes in the woods'. They are parties who are more than familiar with the type of transaction at hand. They were not dealing with a simple sale and purchase of land. Instead, they were dealing with a sale and purchase of land for the specific use as a petrol station. The defendant is in the petroleum business and the plaintiff himself has been a dealer of a few petrol stations before. That is in fact how he describes himself in his witness statement; 'Saya adalah pengusaha stesen minyak'. Hence, they, and in particular the plaintiff, are sufficiently familiar with any peculiar requirements relating to the development and use of the land as a petrol station.

**[45]** It would be reasonable also to say that the plaintiff was familiar with the applicable governing law in relation to the development of a petrol station on the said property including the requirement of the Town and Country Planning Act of 1976 (Act 172). Otherwise, he would not have set about taking on the responsibilities of obtaining the various approvals which are quite specific and related to such development. The SPA is further replete with such particular arrangements and requirements.

**[46]** It is pertinent to note that from the terms of cl 10.2, the parties had clearly contemplated that the plaintiff was to deliver the said property 'entirely exclusive of any portion that may be designated as reserved or any right of way or other road reserve that is ordinarily required by the relevant authorities'. In no uncertain terms, read together with cl 3.1(a), the 'net usable land area of 43,560 square feet or thereabout' must surely exclude land set aside for reserves. Consequently, the purchase price would be adjusted under cl 10.3 of the SPA.

**[47]** Following a line of consistent pronouncements from the apex court in decisions such as *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754, and *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya*

*Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597, the court has no business rewriting any commercial terms or contract for the parties. More so, when the terms are clear and unambiguous which is the case here. The conduct of the parties is consistent with the intention of the parties as set out in the terms and conditions in the SPA. The plaintiff was not only responsible for the approvals but had agreed to ensure that after all the approvals were obtained and the IDT issued, the net usable area of the said property was of the size specifically mentioned in cl 3.1.

**[48]** In contrast, the defendant has satisfactorily explained the reason for the non-payment which is supported by the terms of the SPA. The fact that the defendant now has permission of the relevant authority to use the reserved area is not and cannot be reason to suggest that the defendant has the net usable area as agreed. The truth of the matter is that it does not. And, it is because it does not have that requisite net usable area that it now has to seek permission or approval to use that area or space. The upshot is that the plaintiff's claim for what he calls the balance still due and outstanding is therefore not proved on a balance of probabilities.

SECOND ISSUE: WHETHER THE PLAINTIFF IS ENTITLED TO SPECIFIC PERFORMANCE OF AN ALLEGED COLLATERAL AGREEMENT THAT THE PLAINTIFF BE ENTITLED TO DEALERSHIP TO OPERATE THE PETROL STATION ON THE SAID LAND. IF SO, IS THE PLAINTIFF ENTITLED TO DAMAGES FOR THE DEFENDANT'S FAILURE TO ACCORD SUCH DEALERSHIP TO THE PLAINTIFF

**[49]** Moving on to the second part of the claim, there is no evidence to suggest that the defendant had promised to appoint the plaintiff's nominee to operate the petrol station. This claim involves the interpretation and construction of the defendant's letter dated 23 January 2002 which reads:

PETRONAS DAGANGAN BERHAD (88222-D)

23hb Januari 2002

Tuan Haji Sukiran bin Sarman

No. 18 Jalan 2 Kampung Jambu

43000 Kajang

Selangor Darul Ehsan

Tuan,

TAWARAN PEMBELIAN TANAH UNTUK TAPAK CADANGAN STESEN MINYAK DI LOT 5, GM 627 MUKIM HUJUNG PERMATANG, DAERAH KUALA SELANGOR, TANJUNG KARANG, SELANGOR DARUL EHSAN.

Kami, dengan segala hormatnya merujuk kepada surat tawaran tuan bertarikh 21/6/2001 dan sesi perundingan harga di antara Tuan Haji Sukiran Sarman, Tuan Haji Ismail Kamari dengan wakil PDB yang telah diadakan di Pejabat kami pada 12/12/2001 mengenai perkara di atas.

Sukacita dimaklumkan bahawa PETRONAS Dagangan Berhad ('PDB') dengan rasminya ingin membuat tawaran untuk membeli tanah tapak stesen minyak di atas sebahagian Lot 5, GM 627, Mukim Hujung Permatang, Daerah Kuala Selangor, Tanjung Karang Selangor Darul Ehsan dengan keluasan bersih 43,560 kaki persegi bebas dari sebarang bebanan (free of encumbrances) dan dengan penyerahan kosong (vacant possession) pada harga Ringgit Malaysia Satu Juta Empat Ratus Lapan Puluh Satu Ribu Empat Puluh Sahaja (RM1,481,040-00) bersamaan Ringgit Malaysia Tiga Puluh Empat Sahaja (RM34.00) sekaki persegi dan tertakluk kepada syarat-syarat serta cara pembayaran seperti berikut-

1.0 Tuan adalah pemilik berkepentingan ('beneficial owner') tanah tersebut dan mempunyai hak untuk menjual tanah tersebut kepada PDB.

2.0 Tuan dikehendaki menandatangani Perjanjian Jualbeli Tanah ('Perjanjian Jualbeli') yang disediakan oleh PDB tertakluk kepada syarat-syart berikut:-

2.1 Tuan membenarkan PDB memasuki tanah tersebut untuk menjalankan kerja-kerja awalan membangunkan projek seperti kerja ukur tapak (survey) dan ujian tanah (soil test) selepas menandatangani Perjanjian Jualbeli.

2.2 Pembelian tanah ini adalah berdasarkan tanah tersebut telah diluluskan untuk kegunaan stesen minyak dengan keluasan bersih 43,650 kaki persegi dan mendapat kelulusan jalan masuk ('ingress') dari jalan utama dan jalan keluar ('egress') ke jalan utama oleh pihak berkuasa berkenaan. Segala kos yang terlibat untuk mendapatkan kelulusan-kelulusan berkenaan adalah tanggungan tuan.

2.3 Sekiranya terdapat sebarang sekatan kepentingan yang boleh menghalang urusan pendaftaran pindahmilik tanah tersebut kepada PDB, tuan dikehendaki mendapatkan kelulusan daripada pihak berkuasa negeri untuk membolehkan urusan pembelian tanah berkenaan kepada PDB disempurnakan. Segala kos yang terlibat adalah tanggungan tuan.

2.4 Tuan dikehendaki memastikan tanah tersebut diserahkan kepada PDB bersih dan bebas daripada sebarang bebanan ('free of encumbrances') tanpa sebarang caveat atau lain-lain yang boleh menjejaskan pindahmilik yang akan dilaksanakan oleh PDB.

2.5 Bayaran guaman adalah tanggungan masing-masing tetapi segala duti setem serta yuran pendaftaran ke atas Perjanjian Jualbeli serta suratcara Pindahmilik adalah tanggungan PDB.

3.0 Syarat-Syarat pembayaran …

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4.0 Lain-lain:

4.1 Tuan atau penama tuan akan diberi keutamaan untuk perlantikan sebagai wakil penjual stesen terserbut, di atas dasar milik perseorangan ('sole proprietorship') tertakluk kepada syarat-syarat perlantikan yang ditetapkan oleh PDB dan juga kelulusan daripada Kementerian Kerajaan yang berkenaan.

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4.2 Cukai keuntungan harta tanah ('Real property Gain Tax') atau sebarang cukai berpunca dari perjanjian-perjanjian tersebut adalah tanggungan tuan dan PDB berhak menahan sebahagian daripada harga jualbeli tanah tersebut di atas untuk maksud bayaran cukai keuntungan harta tanah tersebut.

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4.3 Dalam tempoh masa selama dua belas (12) bulan dari tarikh Perjanjian Jualbeli ditandatangani, tuan dikehendaki memperolehi kesemua kelulusan-kelulusan berkenaan daripada pihak-pihak berkuasa tempatan yang berkaitan untuk memajukan tanah ini bagi mendirikan stesen minyak PETRONAS. PDB berhak mempertimbangkan untuk melanjutkan tempoh masa tersebut di atas jika diperlukan. Walau bagaimanapun, PDB juga berhak menamatkan Perjanjian Jualbeli tersebut dan tuan dikehendaki membayar balik kesemua wang yang telah dibayar oleh PDB kepada tuan.

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Sila sahkan persetujuan dan penerimaan tuan terhadap perkara-perkara di atas dengan menandatangani pendua surat ini dan kembalikan kepada kami secepat mungkin.

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Yang benar

b/p PETRONAS DAGANGAN BERHAD

t.t.

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Mohd Mazlan Sharudin

Pengurus Hartanah Runcit

Jabatan Rangkaian Runcit

H

s.k En. Mohd Azri bin Mohd Pilus

Pegawai

Jabatan Undang-Undang & Sekretariat

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**[50]** As evident from the letter set out above, the letter pertains negotiations between the parties that culminated in the SPA. The SPA makes no mention of the matter now raised by the plaintiff. However, the conduct of the parties shows that the understanding between the parties in respect of the dealership issue was not part of the SPA but rests in the letter mentioned above.

**[51]** Be that as it may, the letter does not amount to a promise to award the dealership to the plaintiff. I agree with the plaintiff that at best, it is a promise to give some priority or opportunity to the plaintiff to nominate somebody for the defendant's consideration as a dealer to run the petrol station. Even then, it was on terms or that it was conditional. The contract will not be enforced until all the conditions have been fulfilled.

**[52]** The plaintiff claimed to have delivered or submitted his nomination within the requisite time. The acknowledgment stamps records a different date which is one later than the set date. The plaintiff's complaint about this dateline is that it should be ignored since it was unilaterally imposed.

**[53]** The court is unable to accept this argument. The understanding at all times was that of priority and even then, on conditions. The plaintiff claimed that its allegations of bad faith in refusing to accept the nomination of the wife was said to be supported by inter alia the fact that the defendant owed the plaintiff the balance of the purchase price. With respect, I do not find merit in this contention.

**[54]** DW2 informed the court that although the plaintiff's nomination was submitted late, it was nevertheless considered. The first nomination was rejected because of the age of the nominee. The fresh nomination of the plaintiff's wife, Rafizah. It was not supported with the required financial documentation. The plaintiff did not follow up after the rejection on 26 May 2008.

**[55]** From the evidence presented, it is clear that the opportunity has been afforded and there is no breach.

**[56]** As for relief, I do not find the conditions for the grant of an order of specific performance. As for damages, the plaintiff relied on the evidence of the valuer. The plaintiff had claimed that the land was sold at below the prevailing market value. I agree with the defendant that is suggestion is untenable. In relation to the value of the said property, it was transacted on a willing buyer willing seller basis and that would form the true commercial value of the said property — see *Malayan Banking Bhd v Lim Poh Ho & Anor* [1997] 1 MLJ 662. There are no allegations of it being otherwise. To that extent, I do not find the evidence of PW4 of any great assistance or relevance. In any case, at no time during any of the transactions, whether between the plaintiff and the two brothers; or the plaintiff and the defendant did the matter of valuation of the whole 5.5 acres or the 1 acre plot, arise.

**[57]** There is further no evidence of the plaintiff having negotiated with the defendant at that price finally found in the SPA for any reason other than what

is set out in the SPA. Even PW3 who attended the meeting with the plaintiff does not make that suggestion. However, in terms of the value of his evidence, especially when weighed against that of Hakimi Yaakob ('DW1'), the valuer called by the defendant, I agree with the defendant that DW1's evidence is to be preferred for the reasons submitted. The methodology and the comparables used by DW1 are more appropriate, reliable and acceptable, generally in keeping with the practice frequently deployed in land acquisition cases — see *Collector of Land Revenue v Alagappa Chettiar Collector of Land Revenue v Ong Thye Eng and Cross Appeals* [1971] 1 MLJ 43; *Pentadbir Tanah Daerah Kota Tinggi v Siti Zakiyah bte Sh Abu Bakar & Ors* [2006] 2 MLJ 426. The comparables contain similar characteristics such as type and category of land use besides being within the same location.

**[58]** Clearly the plaintiff had not met those conditions set both by the defendant and the relevant ministries. The reasons for the rejection of the nomination are reasonable. While there may be this collateral promise or agreement, there is no breach in which case, this part of the claim cannot succeed.

**[59]** In any case, as pronounced by the Court of Appeal in *Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd* [1999] 3 MLJ 489 at p 492, agreeing with the submission of the appellant that:

> … there is a principle of great antiquity that a litigant ought not to benefit from its own wrong. Although of universal application, it has been restated when applied to a particular context. For example, the principle when applied in the context of the law of contract may be formulated as follows: a party ought not to be permitted to take advantage of his own breach. See *Alghussein Establishment v Eton College* [1988] 1 WLR 587; *New Zealand Shipping Company Ltd v Societe Des Ateliers Et Chantiers De France* [1919] AC 1.

Similarly, I find that a party who is himself in breach should not be allowed to benefit.

**[60]** The answer to both issues posed must therefore be in the defendant's favour. The claim is accordingly dismissed with costs of RM50,000 which I find suitable and appropriate given the complexity of the issues raised, the amount of work done, the quality of that work, the amount of documents that needed to be perused, and the standing of counsel.

*Claim dismissed with costs.*

Reported by Afiq Mohamad Noor